IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-CV-00329-GKF-SAJ**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S RESPONSE IN OPPOSITION TO THE CARGILL DEFENDANTS' MOTION FOR CLARIFICATION / RECONSIDERATION

COMES NOW the Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA, ("the State"), and submits this response in opposition to the Cargill Defendants' Motion for Clarification / Reconsideration [DKT #1298]. The Cargill Defendants' Motion should be denied for the following reasons:

1. The Cargill Defendants were ordered on July 6, 2007, "to produce documents relevant to the corporate knowledge of the Cargill Defendants of detriment to the environment from the application of poultry waste to the ground without any limit as to the date of the documents or the geographical location to which they relate." Order, p. 3 [DKT #1207]. Nearly three months after entry of this Order (and more than a year after the State made its document requests), the Cargill Defendants still have not produced all of the documents they were ordered to produce. Rather, without any foundation and in an untimely manner, the Cargill Defendants have filed a motion for clarification / reconsideration of the July 6, 2007 Order. Such blatant disregard of one of this Court's orders should not be countenanced.

2. The Cargill Defendants' Motion for Clarification is without foundation. There is nothing unclear or ambiguous about the wording of the Court's July 6, 2007 Order. As noted above, that Order expressly states: "The Court requires Defendants to produce documents relevant to the corporate knowledge of the Cargill Defendants of detriment to the environment from the application of poultry waste to the ground without any limit as to the date of the documents or the geographical location to which they relate." (Emphasis added.) The Cargill Defendants simply do not like what the Order says. The Cargill Defendants' Motion for Clarification should therefore be denied.

3. The Cargill Defendants' Motion for Reconsideration is not only untimely, but also it, too, is without foundation. Motions for reconsideration of discovery motions should be brought within 10 days. *Cf.* Fed. R. Civ. P. 59(e) (requiring motions to amend a judgment be brought within 10 days); Fed. R. Civ. P. 72(a) (requiring objections to a non-dispositive order be served within 10 days). The Cargill Defendants' Motion for Reconsideration was brought nearly 3 months after entry of the Court's July 6, 2007 Order. Further, as explained by the Tenth Circuit:

> Finally, we note that a motion for reconsideration and a successive Rule 60(b) motion, as brought by St. Paul in this case, are inappropriate vehicles to reargue an issue previously addressed by the court when the motion merely advances new arguments, or supporting facts which were available at the time of the original motion. Absent extraordinary circumstances, not present here, the basis for the second motion must not have been available at the time the first motion was filed. Moreover, a motion to reconsider filed within ten days after entry of judgment is considered a Fed. R. Civ. P. 59(e) motion. Grounds warranting a motion to reconsider include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice. Thus, a motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position, or the controlling law. It is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing.

Servants of the Paraclete v. Does, 204 F.3d 1005, 1012 (10th Cir. 2000) (citations omitted). The Court had the benefit of full briefing, *see* DKT #1120, 1136 & 1147, and oral argument when arriving at its decision on this matter. In their Motion, the Cargill Defendants have identified no intervening change in the controlling law, no new evidence previously unavailable, and no need to correct clear error or prevent manifest injustice. Rather, they merely make unsubstantiated arguments about burden. As with their Motion for Clarification, the sum and substance of the Cargill Defendants' Motion for Reconsideration is that they simply do not like the outcome. The Cargill Defendants' Motion for Reconsideration should be denied.

4. Should it nevertheless decide to revisit its July 6, 2007 Order, this Court should reaffirm its holding that discovery of the Cargill Defendants' corporate knowledge of the environmental dangers of poultry waste (as well as the constituents contained in poultry waste) should be "without any limit as to the date of the documents or the geographical location to which they relate" for the following reasons:

a. Discovery into the Cargill Defendants' entire corporate knowledge of environmental dangers of poultry waste (including the constituents in poultry waste) is relevant.[1] Indeed, such a finding is inherent in the Court's July 6, 2007 Order, and is entirely consistent with the premise that relevancy is to be broadly construed under the Federal Rules.[2] It is

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[1] The assertion by the Cargill Defendants that "[a]s the Court recognized in its July 6 Order, extensive evidence and expert testimony would be required to determine what, if any, relevance this global information might have on a location-by-location basis. (Docket No. 1207 at 2)" is simply false. The Order contains no such "recognition." In fact, page 2 of the Order deals solely with the temporal scope of discovery. It does not address the geographical scope of discovery.

[2] Federal Rule of Civil Procedure 26(b)(1) provides that "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party. . . . Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).

therefore up to the Cargill Defendants to demonstrate that corporate knowledge of environmental dangers of poultry waste (including the constituents in poultry waste) gained by it through its operations outside the United States is not relevant. This, of course, the Cargill Defendants cannot do. Water pollution is a worldwide problem; it does not know national boundaries. If the Cargill Defendants have knowledge, for example, that phosphorus causes water quality problems or that phosphorus has the propensity to run off land, it matters not that such knowledge comes from the Cargill Defendants' chicken growing operations rather than its turkey growing operations,[3] or that it comes from the Cargill Defendants' commercial fertilizer operations rather than its poultry operations, or that it comes from its corporate experiences in the United

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"When the discovery sought appears relevant, the party resisting the discovery has the burden to establish the lack of relevance by demonstrating that the requested discovery (1) does not come within the scope of relevance as defined under Fed. R. Civ. P. 26(b)(1), or (2) is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure." *General Electric Capital Corp. v. Lear Corp.*, 215 F.R.D. 637, 640 (D. Kan. 2003). The Supreme Court interprets relevancy in the discovery context "broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 351 (1978).

[3] Without providing any supporting evidence, the Cargill Defendant appear to suggest that knowledge derived from their chicken growing operations in the United Kingdom, Brazil, Thailand, Nicaragua and Honduras is not relevant. Such assertions should not be credited, not only because the Cargill Defendants have not provided any supporting evidence, but also because such assertions are contrary to the Cargill Defendants' adoption of other Defendants' affirmative defenses that they have conducted their operations and activities in accordance with industry standards and the prevailing state of the art and technology in the poultry industry. *See* Affirmative Defense No. 66 in Answer of Cargill, Inc. to Plaintiffs' [sic] First Amended Complaint [DKT #51]; Affirmative Defense No. 66 in Answer of Cargill Turkey Production LLC to Plaintiffs' [sic] First Amended Complaint [DKT #52]; Affirmative Defense No. 52 in Defendant Peterson Farms, Inc.'s Answer to First Amended Complaint; Affirmative Defense No. 48 in Answer and Affirmative Defenses of Defendants Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc. and Cobb-Vantress, Inc. to the First Amended Complaint [DKT #73]; Affirmative Defense No. 47 in Answer and Affirmative Defenses of Defendants Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc. and Cobb-Vantress, Inc. to the First Amended Complaint [DKT #73].

Kingdom, Brazil, Thailand, Nicaragua or Honduras rather than the United States. Corporate knowledge is corporate knowledge from wherever it comes; such knowledge is indivisible.[4]

b. Contrary to the Cargill Defendants' assertion, the State has not changed its position with respect to the documents it wants them to produce. *See* Cargill Motion, p. 8. To support this argument, the Cargill Defendants have taken a line from the State of Oklahoma's Reply in Further Support of Its Motion to Compel Cargill, Inc. and Cargill Turkey Production LLC to Respond to its July 10, 2006 Set of Requests for Production [DKT #1147] out of context, and thus misrepresented the State's position. In that brief the State stated:

> Cargill states that it has "over 90 business units and over 1,000 facilities worldwide." Cargill Response, p. 9. Quite obviously, however, not all of Cargill's 90+ business units and 1,000+ facilities worldwide have a connection or relevance to the poultry industry and its environmental impacts, and Cargill is accordingly not going to be burdened with searching all those units and facilities for responsive documents. By the same token, however, Cargill does have a responsibility to search for and produce documents from those units and facilities within its organization that have a connection or relevance to the poultry industry and its environmental impacts since those bear on claims in this lawsuit.

The Cargill Defendants ignore the words "relevance to" in this paragraph. Knowledge of, for example, the environmental effects of phosphorus on water quality, whether it comes from poultry operations or some other source, plainly has relevance to the poultry industry and its environmental impacts. To contend otherwise is to take an absurdly narrow and improper view of the concept of "knowledge."

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[4] As pointed out in the State's earlier motion to compel [DKT #1120], it should not be overlooked that Cargill appears to approach environmental issues on a company-wide basis. For example, in a document entitled "Citizenship Report: Total Impact," Cargill states: "Cargill believes in continuous improvement to protect the environment. Every year, we learn more, refine our systems and venture closer to our ideal of reducing our environmental footprint. . . . We maintain one set of expectations for every part of Cargill, every country and each of our facilities." *See* DKT #1120 (Ex. H, p. 6 (emphasis added)).

c. The Cargill Defendants' assertion that, because they allegedly have "only" approximately 6% of the poultry houses in the Illinois River Watershed, the July 6, 2007 Order "places a uniquely harsh burden on the Cargill Defendants versus the other Defendants to this litigation," *see* Cargill Motion, p. 8, is irrelevant and should not be credited for at least two reasons. First, it ignores the fact that approximately 6% of the poultry houses in the Illinois River Watershed is a significant number of poultry houses when converted to actual numbers, and that these poultry houses generate tens of thousands of tons of poultry waste every year within the Illinois River Watershed. Second, it ignores the fact that the Cargill Defendants are subject to joint and several liability in this action. *See, e.g., Morrison Enterprises v. McShares, Inc.*, 302 F.3d 1127, 1132 (10th Cir. 2002) ("Liability is strict, joint, and several under [42 U.S.C.] § 9607"); *City of Tulsa v. Tyson Foods, Inc.*, 258 F.Supp.2d 1263, 1299 (N.D. Okla. 2003), *vacated in connection with settlement* ("If the tort is an intentional tort . . ., each defendant who contributed to the indivisible harm is jointly and severally liable to plaintiff for all the damages resulting from that harm") (citations omitted). Thus, the Cargill Defendants are not being treated unfairly in being asked to comply with their discovery obligations in this case.

d. The Cargill Defendants have not come forward with competent evidence supporting their assertions of burden and expense. In fact, the Cargill Defendants plainly admit that they do not yet have such evidence. *See* Cargill Motion, pp. 8-9 ("the Cargill Defendants will soon be able to offer the Court new evidence regarding the burden that Plaintiffs' [sic] new position will place on the Cargill Defendants"). It is the obligation of the Cargill Defendants to present such evidence in their initial moving papers. In any event, in this age of nearly instantaneous worldwide communications, any "burden" of inquiring of its affiliates for responsive information is being greatly exaggerated. The simple fact of the matter is that if the

Cargill Defendants would devote their energies to complying with the Court's July 6, 2007 Order rather than to attempting to evade the State's legitimate discovery inquiries, the State submits that the burden would be lighter on the Cargill Defendants.

e. The law clearly supports the proposition that the Cargill Defendants have an obligation to produce responsive documents from their subsidiaries and affiliates.

> The Federal Rules of Civil Procedure require production of documents "which are under the possession, custody or control of the party upon whom the request is served." The party seeking production of documents bears the burden of proving that the opposing party has the control required under Fed. R. Civ. P. 34(a). "[C]ontrol comprehends not only possession but also the right, authority, or ability to obtain the documents." Specifically, "Courts have universally held that documents are deemed to be within the possession, custody or control if the party has actual possession, custody or control or has the legal right to obtain the documents on demand." However, "[l]egal ownership is not determinative of whether a party has custody, possession, or control of a document for the purposes of Rule 34."

Ice Corp. v. Hamilton Sundstrand Corp., 2007 WL 2436765, *3 (D. Kan. Aug. 22, 2007) (citations and emphasis omitted). As noted above, the Cargill Defendants approach environmental issues on a company-wide basis. *See, e.g.,* Ex. H, p. 6, to DKT #1120 ("Cargill believes in continuous improvement to protect the environment. Every year, we learn more, refine our systems and venture closer to our ideal of reducing our environmental footprint. . . . We maintain one set of expectations for every part of Cargill, every country and each of our facilities.") (emphasis added). In light of such a pronouncement, the Cargill Defendants plainly have the requisite control such that they are obligated to produce the responsive documents.

f. In addition to the arguments made above, the State incorporates the arguments made in The State of Oklahoma's Motion to Compel Cargill, Inc. and Cargill Turkey Production LLC to Respond to its July 10, 2006 Set of Requests for Production and Integrated Brief in Support [DKT # 1120] and The State of Oklahoma's Reply in Further Support of Its

Motion to Compel Cargill, Inc. and Cargill Turkey Production LLC to Respond to its July 10, 2006 Set of Requests for Production [DKT #1147].

Simply put, there is no ambiguity in the Court's July 6, 2007 Order. Moreover, the Cargill Defendants' Motion not only raises no issues appropriate for reconsideration, but also is untimely. In any event, however, the sought-after information from the Cargill Defendants' global affiliates is relevant, and the Cargill Defendants have not supported their assertions of burden in producing this information to the State with credible evidence.

WHEREFORE, premises considered, this Court should deny the Cargill Defendants' Motion for Clarification / Reconsideration [DKT #1298] in its entirety.

Respectfully Submitted,

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I hereby certify that on this 15th day of October, 2007, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

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